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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1705

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
*Petitioner,*

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States Department of the Treasury,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Independent Bankers Association of America ("IBAA") respectfully petitions that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Independent Bankers Association of America* v. *Heimann* (No. 78-2199), dated December 28, 1979.

The judgment and opinion affirmed an order of the United States District Court for the District of Columbia, which dismissed IBAA's complaint. In that complaint IBAA challenged the validity of a regulation

issued by the Comptroller of the Currency ("Comptroller"), 12 C.F.R. Part 2, entitled "Disposition of Credit Life Insurance Income" ("Credit Life Regulation").

## OPINIONS BELOW

The opinion of the court of appeals is reported at 613 F.2d 1164; a copy is attached hereto as Appendix A. A timely petition for rehearing was denied by the court of appeals' order dated February 1, 1980; a copy of that unreported order is attached hereto as Appendix B. The decisions of the district court are unreported. Copies of that court's memorandum and order of September 13, 1978, which dismissed IBAA's complaint, and its subsequent memorandum and order of October 11, 1978, modifying the September 13 opinion and order, are attached hereto as Appendices C and D respectively.

## JURISDICTION

The court of appeals' judgment was entered on December 28, 1979. On January 11, 1980 IBAA filed a timely petition for rehearing and suggestion for an *en banc* rehearing. The court of appeals denied the petition for rehearing in an order dated February 1, 1980 and declined the suggestion for *en banc* review by an order dated January 30, 1980. This Petition is being filed within 90 days of the order denying IBAA's petition for rehearing. The Court has jurisdiction to review the court of appeals' December 28, 1979 judgment by virtue of 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. The first question presented is whether the court of appeals correctly ruled that the Comptroller has authority to issue the Credit Life Regulation as a binding rule of law, *i.e.*, a legislative rule. The lower court found legislative rulemaking authority in a statute which, IBAA has asserted, does not confer such power either by its plain language or by its legislative history. The court determined that legislative rulemaking authority would be consistent with the overall statutory approach to bank regulation and that the Comptroller should be deemed to have such power absent a clear statement by Congress to the contrary.

Having concluded that, for policy reasons, the Comptroller *should* have legislative rulemaking power, the court focused on the language of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818, and ruled that authority to issue legislative rules is found in subsections 1818(b) and (n). However, as IBAA has contended, subsection 1818(b) simply empowers the Comptroller to conduct cease-and-desist proceedings, which are adjudicative actions, and subsection 1818(n) merely authorizes the Comptroller to issue procedural rules.

2. The second question presented is whether under the McCarran-Ferguson Act, 15 U.S.C. § 1012, the authority of the states to regulate the business of insurance can be superseded by a banking regulation issued by the Comptroller pursuant to a statute which does not specifically relate to the business of insurance.

IBAA asserted before the court of appeals that the Credit Life Regulation violates the McCarran-Fergu-

son Act, which reserves to the states plenary authority to regulate the business of insurance except where Congress has enacted legislation which *specifically* relates to the business of insurance. IBAA maintained that the regulation is an attempt to displace state insurance laws governing the licensing of insurance agents, which has been held to be part of the business of insurance. The court of appeals ruled that nothing in the McCarran-Ferguson Act was intended to affect the Comptroller's power, under authority of Congress, to regulate "unsafe and unsound" banking practices. It thereby permitted the Comptroller to supersede the authority of the states. The Court removed this activity from the category of the "business of insurance" on the ground that the Comptroller issued the regulation in furtherance of his power to supervise banking activities.

3. The third question which IBAA presents for review is whether the court of appeals erred in holding that the Credit Life Regulation is not contrary to section 92 of the National Bank Act. This Court and the Tenth and Fifth Circuits have held that this statute precludes national banks in places of more than 5,000 persons from serving as agents for the sale of credit life insurance. Notwithstanding these rulings, the Credit Life Regulation determined that a national bank may act as agent for the sale of credit life insurance, without regard to the size of the bank's community. In upholding the Credit Life Regulation, the court of appeals ruled that section 92 does not apply to credit life insurance, thereby creating a direct conflict with the aforesaid holdings of this Court, the Tenth Circuit and the Fifth Circuit.

## STATUTES AND REGULATION INVOLVED

### Statutes

The following statutes are involved in this case:

Section 202 of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818(b) (1976), which is set forth in Appendix E hereto;[1]

Section 202 of the Financial Institutions Supervisory Act of 1966, 12 U.S.C. § 1818(n) (1976), which is set forth in Appendix F hereto;[1]

Subsections 2(a) and (b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012(a) and (b), which are set forth in Appendix G hereto;

Section 92 of the National Bank Act, Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (12 U.S.C.A. § 92), which is set forth in Appendix H hereto.

### Regulation

The regulation involved in this case is 12 C.F.R. Part 2 (1979), which is set forth in Appendix I hereto.

## STATEMENT OF THE CASE

On September 23, 1977, the Comptroller issued the Credit Life Regulation, which he termed a "Final Regulation." 42 Fed. Reg. 48518. It became effective on January 1, 1978. This regulation, a reversal of the government's previous policy, bars bank personnel

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[1] In 1978 these provisions were amended by the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, Title I, §§ 107(a)(1), (b), 111(a)(5), Title III, § 303, 92 Stat. 3641, 3649, 3650, 3653, 3667, 3676. Those amendments are immaterial to the issues in this lawsuit.

from retaining commission income from the sale of credit life insurance. Specifically, it directs that "[n]o bank employee, officer, director or principal shareholder [a person owning more than 5% of a bank's outstanding shares] may retain commissions or other income from the sale of credit life insurance in connection with any loan made by the bank." 12 C.F.R. § 2.4(a).

Credit life insurance is insurance that is sold to loan customers of banks, including patrons of IBAA member national banks, as security for loans. At many such banks a loan customer may purchase credit life insurance from an insurance agency which is located on the bank's premises and which is owned by the bank's directors, officers, employees or principal shareholders. When a customer chooses to purchase a policy through this agency, the insurance agent receives whatever commission is paid by the insurance company.

This long-established method of selling credit life insurance is consistent with positions previously taken by the Comptroller and his sister agency, the Federal Deposit Insurance Corporation. It is frequently utilized in situations in which the bank itself is forbidden by federal or state laws from retaining commission income or from otherwise acting as an insurance agent.

The regulation authorizes eight alternative methods by which national banks may furnish credit life insurance to their customers. Under six of the alternatives, the bank actually functions as an insurance agent (subparagraphs 2.6(a), (b), (d), (e) and (g) and para. 2.4). As a result of the issuance of the Credit Life Regulation, national banks in towns of more than 5,000 persons and national banks in certain states which bar

banks from acting as insurance agents faced the prospect of violating federal and state law if they adopted any of the six alternatives which permit banks to perform insurance agency functions. Alternatively, if a bank adopted either of the two remaining options specified in the regulation—the acquiring of a group policy (subsection 2.6(c)) or providing credit life insurance to loan customers at the bank's expense (subsection 2.6(f))—the bank would have to absorb some or all of the cost of furnishing credit life insurance to its loan customers.

On December 27, 1977 IBAA filed a complaint in the United States District Court for the District of Columbia, alleging that the Comptroller lacked authority to issue the Credit Life Regulation, that the regulation is contrary to state and federal law, and that the Comptroller failed to observe procedures required by the Administrative Procedure Act. Jurisdiction was premised on the United States Judicial Code, 28 U.S.C. §§ 1331, 1337 and 1346(a)(2), and on the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

The district court dismissed IBAA's complaint in an order and opinion issued on September 13, 1978. It concluded that the Comptroller had conceded that the Credit Life Regulation is nothing more than a statement of opinion and that by making this concession the Comptroller gave IBAA all of the relief which the court could have awarded IBAA. The Comptroller filed a motion to modify that opinion, asserting that he never made such a concession. On October 11, 1978 the court modified its prior order by withdrawing its conclusion that the regulation was merely a statement of opinion. It nevertheless upheld its order dismissing the com-

plaint, this time for reasons concerning ripeness, *i.e.*, that the Credit Life Regulation's validity should be decided in cease-and-desist proceedings. Thus, neither of the district court's opinions considered the merits of IBAA's complaint.

The court of appeals held that the matter was ripe for judicial review, that IBAA has standing to bring this lawsuit, and, therefore, that it was unnecessary to await cease-and-desist proceedings. The court went on to address each of the issues raised by IBAA in its appeal, holding that the Comptroller had authority to issue the Credit Life Regulation as a binding rule of law, that the regulation was not contrary to either section 92 or the McCarran-Ferguson Act and that the Comptroller did not conduct the rulemaking proceeding in a manner which violated the Administrative Procedure Act.

## REASONS FOR ALLOWANCE OF THE WRIT

**1. The Court Of Appeals' Holding That The Comptroller Has Authority To Issue The Credit Life Regulation As A Legislative Rule Conflicts With Applicable Decisions Of This Court And Raises The Important Federal Question Of The Proper Criteria For Determining Whether A Federal Agency Has Legislative Rulemaking Authority.**

The court of appeals' ruling is a departure from the fundamental principle that a federal agency may issue legislative regulations only if Congress has expressly delegated this power to the agency. *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). As this Court has held, in the absence of such delegation an agency's pronouncements are merely interpretative statements rather than regulations which have the force of law. *General Electric Company* v. *Gilbert,* 429 U.S. 125,

141-142 (1976). *Compare American Telephone and Telegraph Co.* v. *United States,* 299 U.S. 232, 235-237 (1936) (which involved legislative rules), *with Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944) (which considered interpretative statements).

The court of appeals essentially concluded that the Comptroller *should* have authority to issue the Credit Life Regulation as a binding rule, and then it "found" such authority in a statute which neither by its plain, unambiguous language nor by its legislative history confers legislative rulemaking authority

Specifically, the court of appeals held that if the Comptroller had authority to issue the Credit Life Regulation as a legislative rule there would be no need for case-by-case adjudication. The court further concluded that the banking industry is highly regulated, and, therefore, legislative rulemaking authority is consistent with the overall statutory approach to bank regulation. It reasoned that, *absent a clear statement by Congress to the contrary,* the Comptroller is deemed to have power to issue the Credit Life Regulation as a legislative rule of law.

With these policy considerations in mind, the court of appeals considered whether section 1818 contains any language which confers such rulemaking authority. It focused on two provisions of the Act. One provision, subsection 1818(b), authorizes the Comptroller to conduct cease-and-desist proceedings to determine whether a bank has engaged in an "unsafe and unsound" practice. This measure authorizes adjudicative actions, not rulemaking. The other provision, subsection 1818(n) (not cited by the Comptroller at the time he promulgated the regulation), authorizes the Comp-

troller ". . . to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash or modify subpenas and subpena duces tecum; and such agency is empowered to make rules and regulations with respect to any such [cease-and-desist] proceedings." *See* Appendix F at 22a. By its plain language it thus authorizes only procedural regulations.

This conclusion respecting subsection 1818(n) is reinforced by the fact that the rulemaking clause is sandwiched between clauses authorizing the agency to administer oaths, to take depositions, to issue subpoenas and to enforce subpoenas, all of which are purely procedural matters. Under the rule of *ejusdem generis,* these procedural grants of authority must be considered when a court construes the meaning of the phrase "such agency is empowered to make rules and regulations with respect to any such proceedings."[2] The enumeration of specific procedural functions in subsection 1818(n) must be read as a limitation on the grant of rulemaking authority therein.

Furthermore, the Senate Committee report pertaining to subsection 1818(n) made no reference whatsoever to the rulemaking clause. Instead, it discussed the fact that the agency would be permitted to administer oaths, take depositions and issue subpoenas in connection with cease-and-desist proceedings. The House report did not even mention subsection 1818(n).[3]

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[2] Cleveland v. United States, 329 U.S. 14 (1946).

[3] S. Rep. No. 1482, 89th Cong., 2d Sess. 26, *reprinted in* [1966] U.S. Code Cong. & Ad. News 3532, 3558; H.R. Rep. No. 2077, 89th Cong., 2d Sess. (1966).

In the face of the plain language of subsections 1818(b) and (n) and in the absence of *any* reference in the legislative history of the Act which would indicate that Congress intended for these provisions to confer legislative rulemaking authority, the court said, in a footnote, that these provisions constitute an "explicit" grant of legislative rulemaking authority. 613 F.2d at 1169 n.16 (App. A at 8a.) However, that conclusion is directly contradicted by the court's statement, in the text of its opinion, that this statute is "ambiguous and fails to contain an express grant of authority to define 'unsafe and unsound practices'...." 613 F.2d at 1168. (App. A at 6a.)

The court thus did not base its reference to an "explicit" grant of legislative rulemaking authority on the plain language of the statute at issue, nor on statements made by any Congressional committee or member of Congress. Instead, it effectively ruled that an express grant is unnecessary if a court determines that such rulemaking authority would aid the agency in the performance of its duties and Congress has not clearly stated that the agency lacks such authority. Such a ruling does no less than establish that *inherent* legislative rulemaking authority can exist. Indeed, the Administrator of the Environmental Protection Agency has already cited the court of appeals' decision for the proposition that "[a]gencies have inherent powers to effectuate statutory purposes by reasonable means, provided those means are not inconsistent with the statute."[4]

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[4] Letter from Douglas M. Costle, Administrator of EPA, to E. G. Ratering, General Motors Corporation, denying "Petition for Reconsideration of Noise Emission Standards for Truck-Mounted Solid Waste Compactors" at 6. (March 10, 1980).

The court of appeals sought to analogize subsection 1818(n) to subsection 6(g) of the Federal Trade Commission Act, 15 U.S.C. § 46(g), which the District of Columbia Circuit has held to confer legislative rulemaking authority. *National Petroleum Refiners Ass'n* v. *Federal Trade Commission,* 482 F.2d 672 (D.C. Cir.), *cert. denied,* 415 U.S. 951 (1973). In contrast to subsection 1818(n), which empowers the Comptroller to "make rules and regulations with respect to any such [cease-and-desist] proceedings," subsection 6(g) empowers the FTC to make rules and regulations for the purpose of carrying out the provisions of the Federal Trade Commission Act itself.[5]

It is the broad language of subsection 6(g) which the *National Petroleum* court stressed when it held that this statute authorized the F.T.C. to promulgate binding regulations. The court added that its reading of subsection 6(g) was reinforced by the construction which other courts have given to similar statutes. 482 F.2d at 678. Without exception, the statutes which were at issue in the cases cited by the *National Petroleum* court conferred broad rulemaking authority on the agency or authorized legislative rulemaking with respect to a specific subject.[6] Thus, these statutes are completely unlike subsection 1818(n).

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[5] Subsection 6(g) (15 U.S.C. § 46(g)) provides as follows:

The Commission shall also have power—

* * *

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of section 41 to 46 and 47 to 58 of this title.

[6] These cases included decisions by this Court which held that the following agencies possess legislative rulemaking authority:

A. Federal Communications Commission

1. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); (continued)

Likewise, Congress has conferred general legislative rulemaking authority on other agencies which regulate financial institutions, using language similar to subsection 6(g) and wholly unlike subsection 1818(n).[7] In short, Congress is aware of the type of language which confers legislative rulemaking authority on federal agencies, and it did not include that language in subsection 1818(n).

By holding that subsections 1818(b) and (n) constitute a grant of legislative rulemaking authority, the court of appeals has nullified the concept that Congress must delegate such power. Now, all that need be shown

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2. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

B. Food and Drug Administration
Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

C. Federal Power Commission
1. Federal Power Commission v. Texaco, Inc., 377 U.S. 33, rehearing denied, 377 U.S. 974, 984 (1964);
2. In re Permian Basin Area Rate Cases, 390 U.S. 747, rehearing denied, 392 U.S. 917 (1968).

D. Interstate Commerce Commission
American Trucking Associations v. United States, 344 U.S. 298, rehearing denied, 345 U.S. 913 (1953).

E. Federal Reserve Board
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973).

F. National Labor Relations Board
N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969).

[7] Congress has *expressly* granted legislative rulemaking to the following agencies which regulate financial institutions:

A. Board of Governors of the Federal Reserve System, 12 U.S.C. § 248(i).

B. Federal Deposit Insurance Corporation, 12 U.S.C. § 1819 (Tenth).

C. National Credit Union Administration, 12 U.S.C. § 1766(a).

D. Federal Home Loan Bank Board, 12 U.S.C. § 1464(a).

E. Federal Savings and Loan Insurance Corporation, 12 U.S.C. § 1730a(h)(1).

is that such rulemaking power would aid the agency in the performance of its duties. In the words of the EPA, this case stands for a rule that agencies have *inherent* powers to effectuate statutory purposes. The court of appeals' decision is a major departure from the principles articulated by the Court on a subject of importance—legislative rulemaking authority—and, therefore, the Court should grant IBAA's Petition.

**2. The Court Of Appeals' Decision Raises The Important Federal Question Of The Proper Scope Of The McCarran-Ferguson Act.**

IBAA contended below that the Credit Life Regulation violates the McCarran-Ferguson Act, 15 U.S.C. § 1012, because it regulates the business of insurance. That act gives the states plenary power to regulate the business of insurance and every person engaged therein, except where Congress has enacted legislation which specifically relates to the business of insurance. 15 U.S.C. § 1012.

The Credit Life Regulation directly regulates the business of insurance because it absolutely prohibits individuals who are employees, officers, directors or principal shareholders of national banks from retaining commission income from the sale of credit life insurance to the banks' loan customers. This prohibition against the receipt of commission income precludes those individuals from serving as insurance agents. Any regulation which prohibits an individual from receiving compensation for his labor on a job effectively prohibits that person from engaging in that occupation.

In this manner, the Credit Life Regulation impermissibly intrudes upon the right of the states to establish qualifications which individuals must satisfy in

order to sell credit life insurance. Almost all fifty states have enacted statutes which authorize individuals, including bank personnel, to act as agents for this type of insurance, and such statutes establish the qualifications which an individual must possess to obtain a license.

The Credit Life Regulation further encroaches on the licensing authority of the states by authorizing banks to act as insurance agents and to receive income resulting from the sale of credit life insurance. By so authorizing national banks, the regulation vitiates the laws of several states which bar banks from acting as insurance agents.[8]

The licensing of individuals to be insurance agents is well within the sphere of the business of insurance. This Court, in considering what constitutes the "business of insurance", has expressly stated that "the licensing of companies and their agents" is within the scope of the McCarran-Ferguson Act. *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).[9] Simi-

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[8] *E.g.*, Tex. Ins. Code Ann. Art. 21.07-1-4(d)(1) (Vernon) (a corporation can be licensed to perform insurance agency functions only if it is a Texas Corporation organized under the Texas Business Corporation Act; national banks are not organized under that Act); Okla Stat. Tit. 36, § 1407.1 (no corporation which has any purpose other than the transaction of insurance business may be licensed as an agent in Oklahoma); Neb. Stat. 44-392 (making it a misdemeanor for a bank in a location having a population of 200,000 or more to sell, write or solicit any kind of insurance, either directly or indirectly); Ohio Revised Code Ann. § 3911.01 (Page) (the business of life insurance or life and accident insurance shall not be in any way transacted by any company which does a banking business); Ill. Rev. Stat. Ch. 73 § 1065.53 (a license to act as an agent may not issue to a national bank located in a place exceeding 5000 in population).

[9] In National Securities this Court concluded that the McCarran-Ferguson Act did not apply because the state was not regulating

larly, several United States courts of appeals and district courts have treated the relationship of insurers and their agents as being so closely related to the core of the insurer-insured relationship as to come within the scope of the "business of insurance".[10]

In its opinion, the court of appeals made no effort to reconcile its holding with these precedents. Instead, it concluded that because the Comptroller prohibited the retention of commission income under his authority to regulate unsafe and unsound banking practices, the McCarran-Ferguson Act was not implicated. The Court said, "[n]othing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate 'unsafe and unsound' banking practices of national banks." 613 F.2d at 1170. (App. A at 11a.)

In an effort to accommodate the Comptroller's interest in regulating "unsafe and unsound" *banking* practices, the court ignored the fundamental statutory mandate that if a practice involves the business of insurance, it is subject to plenary regulation by the states by virtue of the McCarran-Ferguson Act. In this regard, it has been held that if an activity which is part

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an insurance relationship; it was, instead, regulating the relationship between a stockholder and the company in which he owns stock. Thus, that case did not involve the issue presented by this case: where the state regulates an activity which is part of the business of insurance, may a federal banking regulation supersede the state law?

[10] *E.g.*, Black v. Nationwide Mut. Ins. Co., 429 F. Supp. 458, 463 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978); Card v. Nat'l. Life Ins. Co., 603 F.2d 828, 832 (10th Cir. 1979); Lawyer's Realty Corp. v. Peninsular Title Ins. Co., 428 F. Supp. 1288, 1291 (E.D. La.), *aff'd*, 550 F.2d 1035 (5th Cir. 1977); California League of Independent Ins. Producers v. Aetna Cas. & Sur. Co., 175 F. Supp. 857, 860 (N.D. Cal. 1959).

of the business of insurance has a collateral consequence in another area the McCarran-Ferguson Act nevertheless reserves to the states the power to regulate the activity. *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976). As the court said in that case, "[t]he mere fact that the services performed by a title insurance company are an indispensable part of the transfer of real estate does not remove those services from the sphere of the insurance business." 418 F. Supp. at 368.

The absence of any judicial support for the court of appeals' novel analysis is evident from the fact that it relied solely on *Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). Such reliance is inapposite. In *Royal Drug,* which was an antitrust case, this Court held simply that transactions between an insurer and pharmacies did not constitute the "business of insurance". Its holding concerned third-party provider agreements whereby a pharmacy contracted with a health insurance company to supply goods and services other than insurance. In contrast, the Credit Life Regulation overrides state laws which govern an essential aspect of the business of insurance: the criteria for becoming an insurance agent.

In summary, the court of appeals' ruling represents an unwarranted restriction on the McCarran-Ferguson Act's protection of the states' primacy in regulating the business of insurance.

**3. The Court Of Appeals' Decision Conflicts With Decisions Of This Court And Two Circuit Courts Of Appeals On The Scope Of Section 92 Of The National Bank Act.**

While prohibiting bank employees, officers, directors and principal shareholders from retaining credit life

insurance commission income, the Credit Life Regulation authorizes *all* national banks, themselves, to act as agents for the sale of credit life insurance, and to retain the commission income. In support of this authorization, the Comptroller asserted, in the statement which accompanied the regulation, that "... no federal statute bars a national bank from acting as agent or otherwise selling credit life insurance . . ." 42 Fed. Reg. at 48519. This purely legal conclusion, which directly contradicts holdings of this Court, two United States courts of appeals, and the Comptroller's previous interpretation of section 92, does not involve the Comptroller's expertise, and should be accorded no deference by this Court.[11]

This Court and the Fifth Circuit and Tenth Circuit Courts of Appeals have held that section 92 of the National Bank Act prohibits a national bank in a community with a population of more than 5,000 persons from acting as agent for insurance companies, including insurance companies which sell credit life insurance. *First Security Bank of Utah* v. *Comm'r of Internal Revenue,* 436 F.2d 1192 (10th Cir. 1971), *aff'd,* 405 U.S. 394 (1972); *Saxon* v. *Georgia Ass'n. of Independent Insurance Agents, Inc.,* 399 F.2d 1010 (5th Cir. 1968).

In a ruling which directly conflicts with these cases, the court below held that the Credit Life Regulation does not violate section 92 because it considered that this statute does not apply to credit life insurance. There is no basis in the legislative history of section 92 for this arbitrary exclusion of credit life insurance.

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[11] *See* Morton v. Ruiz, 415 U.S. 199, 237 (1974); Arnold Tours, Inc. v. Camp, 472 F.2d 427, 435-36 n.12 (1st Cir. 1972).

In concluding that section 92 does not relate to credit life insurance, the court of appeals attempted to distinguish this Court's holding in *First Security Bank of Utah* by asserting that it involved "no direct holding on the issue presented in this litigation." 613 F.2d at 1170. (App. A at 10a.) This is incorrect. In its opinion in that case this Court stated that ". . . the proscription against acting as insurance agent and receiving compensation therefor applies to *all* national banks located in places with population in excess of 5,000 inhabitants." 405 U.S. at 407 (emphasis in text). This is not *dicta*. The Court's determination that the banks were statutorily prohibited from receiving premium income was essential to its conclusion that a reallocation of income for federal tax purposes was unwarranted. The Court said, "[w]e know of no decision of this Court wherein a person has been found to have taxable income that he did not receive *and that he was prohibited from receiving.*" 405 U.S. at 403 (emphasis added).

The court below made no reference to the Tenth Circuit's ruling in *First Security Bank of Utah,* which also directly held that a national bank in a town of more than 5,000 persons could not legally receive commission income from the sale of credit life insurance.

Finally, the court of appeals attempted to distinguish the *Saxon* case on the ground that it ". . . did not involve credit life but rather banks' authority to sell broad forms of automobile, home, casualty and liability insurance." 613 F.2d at 1170. (App. A at 10a.) This conclusion is incorrect. In footnote 33 on page 44 of his brief on appeal in *Saxon,* the Comptroller specifically referred to the testimony of various experts concerning the administration of a credit life insurance program by a bank-related insurance agency.

In summary, both *First Security Bank of Utah* and *Saxon* are on point, and the District of Columbia Circuit's holding is in conflict with them. In view of this conflict, the Court should address the lower court's ruling.

## CONCLUSION

For the foregoing reasons, this Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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# APPENDICES
# TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 78-2199

INDEPENDENT BANKERS ASSOCIATION OF AMERICA, *Appellant*,

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States Department of Treasury,

Argued October 23, 1979

Decided December 28, 1979

Rehearing Denied February 1, 1980

Appeal from the United States District Court for the District of Columbia (D.C. Civil 77-2189).

Samuel K. Abrams, Washington, D.C., with whom Thomas J. Segal, Brian E. Moran, Washington, D.C. and Horace R. Hansen, St. Paul, Minn., were on the brief, for appellant.

Michael J. Ryan, Asst. U.S. Atty., Washington, D.C., with whom Earl J. Silbert,* U.S. Atty., John A. Terry, Michael W. Farrell, David H. Shapiro, Asst. U.S. Attys., and Thomas P. Vartanian, Dorothy A. Sable, Attys., Washington, D.C., were on the brief, for appellee.

Before McGOWAN and WILKEY, Circuit Judges and GESELL,** United States District Judge for the District of Columbia.

Opinion for the Court filed by District Judge GESELL.

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* United States Attorney at the time the brief was filed.

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

GESELL, District Judge.

This is an appeal from an Order of the District Court dismissing a complaint filed by Independent Bankers Association of America ("IBAA"). IBAA seeks to enjoin the Comptroller of the Currency of the United States from continuing to enforce a regulation entitled "Disposition of Credit Life Insurance Income," 42 Fed.Reg. 48518-26 (1977)[1] The challenged regulation prevents insiders of national banks from benefitting personally by the regular receipt of credit life insurance income sold to borrowers of such banks. Appellant contends that the Comptroller exceeded his legal authority under the national banking laws when he promulgated the regulation, and that he acted arbitrarily and contrary to other specific federal and state laws.

The District Court in effect held that since the Comptroller was proceeding to enforce the regulation by entering cease and desist orders against individual non-complying national banks, IBAA's broad attack against the regulation as a whole should not be entertained.[2] Thus the lower court's ruling left resolution of the issues to piecemeal litigation, a course urged by the Comptroller. We reject this approach. After finding that the issue of the regulation's validity is ripe for judicial review and that IBAA has standing, we consider the merits and hold that the Comptroller's credit life regulation is authorized by law and is neither arbitrary nor capricious. We therefore uphold the regulation against appellant's challenge, without necessity for remand to the District Court.

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[1] The regulation, which took effect January 1, 1978, is codified at 12 C.F.R. § 2 (1979).

[2] *See Independent Bankers Assn. of America* v. *Heimann*, No. 77-2189 (D.D.C. Sept. 13, 1978, *modified* Oct. 11, 1978), *reproduced at* Appellant's Appendix (AA) 247a-252a.

**STANDING AND RIPENESS**

IBAA is a nonprofit trade association representing approximately one-half of all commercial banks in the United States, including 1,950 national banks directly affected by the regulation in dispute. It participated as the representative of its members in the rulemaking proceeding and is fully qualified and authorized to represent their interests. The complaint alleges and a subsequent affidavit supports IBAA's claim that the regulation has an immediate and direct impact on its national bank members by requiring these member banks to abandon established practices for the provision of credit life insurance.[3] IBAA contends that the Comptroller is forcing appellant's members to choose between switching to more costly and otherwise illegal insurance sales methods or risking civil prosecution with its attendant loss of public confidence. This is more than sufficient to establish a direct injury in fact. *See Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

The injury asserted is, moreover, both a generalized competitive impact and a specific financial detriment. Because such economic concerns of this highly regulated banking industry are committed by statute to the authority of the Comptroller,[4] appellant has satisfied the zone of interest test. *See Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Although the regulation is as the Comptroller suggests directed primarily to activities of insiders and not to the banks themselves, the regulated activities are entirely intermeshed with the day-to-day functions of national

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[3] *See* Complaint at ¶¶ 9-15; Affidavit of Richard W. Peterson, Dec. 21, 1977 at ¶¶ 4-10, *reproduced* at AA 7a-12a; 42a-47a.

[4] *See* 12 U.S.C. §§ 21 *et seq.* (1976). *See generally Investment Co. Institute* v. *Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971).

banks. We have recognized IBAA's standing in comparable situations in the past and will do so again here.[5]

It is further evident that the issues raised by the complaint are ripe for decision. The Comptroller states that he fully intends to enforce the credit life regulation through all appropriate means. This includes both public administrative proceedings pointed toward cease and desist orders and negotiated compliance agreements.[6]

The Comptroller would apparently prefer to see the validity of the regulation litigated over the ensuing years, Circuit-by-Circuit. He has, however, taken final agency action in issuing the regulation and the legal issues raised by the complaint can be resolved without need of case-by-case factual development. *See generally Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). As indicated above, the hardship to appellant is sufficiently direct and immediate to confer standing. Such being the case, prompt resolution will eliminate uncertainty and be in the interest of efficient judicial administration.

Although the case could now be remanded to the District Court for a decision on the merits, we have concluded that such a course is unnecessary and indeed would be unduly wasteful of judicial resources. A full record is before us, devoid of issues of disputed material fact. The parties cross-moved for summary judgment in the lower court and the relevant legal questions have been fully briefed and

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[5] *See Independent Bankers Assn. of America* v. *Smith,* 402 F. Supp. 207 (D.D.C. 1975), *aff'd,* 175 U.S.App.D.C. 184, 534 F.2d 921 (D.C. Cir.), *cert. denied,* 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed. 2d 141 (1976); *Independent Bankers Assn. of America* v. *Heimann,* No. 78-0811 (D.D.C. Oct. 30, 1978).

[6] At oral argument the Comptroller represented that his office had initiated enforcement under the regulation three times since January, 1978. On each occasion, administrative proceedings ended in a consent order; enforcement through cease and desist orders has not been necessary.

argued on appeal. This Court sees no benefit to be gained by delay. *See* 28 U.S.C. § 2106. *See generally Grosso v. United States,* 390 U.S. 62, 71-72, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968).

**THE COMPTROLLER'S RULEMAKING AUTHORITY**

The Comptroller initiated the rulemaking proceeding in aid of his statutory responsibilities under the Financial Institutions Supervisory Act of 1966,[7] 12 U.S.C. § 1818. Section 1818(b) expressly authorizes the Comptroller in his discretion to proceed to issue cease and desist orders against national banks engaged in an "unsafe or unsound" banking practice or violating "a law, rule or regulation" the Comptroller may issue. Under Section 1818(n) the Comptroller is "empowered to make rules and regulations" with respect to any proceeding initiated pursuant to this section.

The challenged regulation relating to disposition of credit life insurance income is designed to identify what the Comptroller has determined to be an unsafe and unsound banking practice. The regulation is not complex. It prohibits officers, directors and principal shareholders of national banks from retaining for their own benefit income derived from the sale of credit life insurance in connection with loans made by the bank.[8]

Credit life insurance[9] originated early in this century as a security device to protect the extension of consumer credit by banks. It is today a principal form of security routinely obtained by national banks making consumer

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[7] Pub.L.No. 89-695; 80 Stat. 1046.

[8] *See* 12 C.F.R. § 2.4(a) (1979).

[9] The term "credit life insurance" encompasses health, accident or life insurance coverage issued as protection for a loan. *See* 12 C.F.R. § 2.3(e) (1979).

loans. Formal tying arrangements between the extension of credit and the sale of such insurance are prohibited by statute.[10] However, the receipt by officers and others of personal commissions from credit life insurance sales may well stimulate overselling to potentially uninterested borrowers, often without disclosure to the full board of directors or at the cost of diminished attention to the bank's own investment priorities.[11] The Comptroller, conscious of fiduciary principles, sought to avoid the obvious conflict of interest which is present when insiders personally benefit from bank functions through what is, in effect, a form of self-dealing. Finding such diversions of income from the banks to be unsafe and unsound, the Comptroller prohibited the practice while suggesting a variety of flexible procedures still available to national banks enabling them to benefit from credit life insurance income generated by their loan activities.[12]

Because the statute is ambiguous and fails to contain an express grant of authority to define "unsafe and unsound" practices the authority of the Comptroller to define such a practice by rule is strenuously questioned in this proceeding. Appellant urges the Court to find that in view of Congress's unwillingness to authorize issuance of substantive regulations, the challenged publication is no more than an interpretative statement, not entitled to status as a binding rule. *See Batterton v. Francis,* 432 U.S. 416, 425 n. 9, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 141, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).

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[10] 12 U.S.C. § 1972 (1976).

[11] *See* 42 Fed.Reg. 48523-24 (1977) (statement of reasons accompanying final regulation).

[12] *See* 12 C.F.R. § 2.6(a) through (g) (1979) (listing alternatives).

There is little room for doubt, however, that the Comptroller is proceeding as Congress contemplated. National banks are perhaps as meticulously regulated as any industry. Every aspect of their affairs is scrutinized to assure financial soundness and ethical practice. The Comptroller's statutory duties require the closest monitoring and continuous supervision of these institutions.[13] Thus, the Comptroller's discretionary authority to define and eliminate "unsafe and unsound" conduct is to be liberally construed.

Indeed, as the language of Section 1818(b) itself suggests, a regulation giving advance notice of conduct which the Comptroller disapproves as threatening to the safety and soundness of the banks he regulates is wholly consistent with the statutory scheme. The Comptroller was given authority to promulgate regulations in order to facilitate execution of his statutory powers. *See* 12 U.S.C. § 1818(n). It would undermine the regulatory purpose of Congress to assume that the Comptroller must proceed solely by separate "cease and desist" cases. His ability to forewarn by specifying and clarifying the nature and scope of his concerns will at the same time minimize the necessity for recurrent and costly investigation into the conduct of the many individual banks under his supervision.

This Court has had occasion in a closely analogous context to consider the authority of the Federal Trade Commission to implement its mandate over "unfair and deceptive" practices through regulation. Considerations of specific language and overriding statutory purpose which led to a recognition of that Commission's substantive rule-

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[13] *See generally* 12 U.S.C. §§ 21 *et seq.* (1976). One commentator has characterized regulation of national banks as:

> more intensive than the regulations of any other industry, and . . . extends to all major steps in the establishment and development of a national bank, including not only entry into the business, changes in status, consolidations, reorganizations, but also the most intensive supervision of operations. . . .

1 K. Davis, Administrative Law Treatise 247 (1958).

making authority are equally and forcefully applicable to the case at hand. *See National Petroleum Refiners Assn. v. FTC,* 482 F.2d 672, *cert. denied,* 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1973). The statutory provisions analyzed in *National Petroleum* are wholly comparable to those on which the Comptroller here relies.[14] Moreover, as in *National Petroleum,* we see no reason to impose a restrictive procedural gloss on the agency's authority "to make rules and regulations" when a properly promulgated substantive rule unquestionably effectuates the statutory plan. *See id.* at 678. Absent a clear congressional expression to the contrary,[15] the Comptroller is entitled to accomplish his regulatory responsibilities over "unsafe and unsound" practices both by cease and desist proceedings and by rules defining and explicating the practices which in his discretion he finds threatening to a stable and effective national bank system.[16]

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[14] *Compare* 12 U.S.C. §§ 1818(b) *and* 1818(n) *with* 15 U.S.C. §§ 45(b) *and* 46(g). Each statute confers authority to police unhealthy practices, broadly defined (*i. e.*, "unsafe and unsound practices" in banking: "unfair or deceptive act[s] or practice[s]" in commerce), and to promulgate regulations in aid thereof.

[15] We reject appellant's contention that unsuccessful efforts during the 95th Congress to legislate with respect to the Comptroller's general rulemaking authority convey such a narrowing of congressional intent. In fact, the legislative history indicates an understanding that the explicit rulemaking authorization proposed in Title XIV of the House bill reported out of committee was meant to clarify existing agency powers, rather than create new authority. *See* H.R.Rep.No. 1383, 95th Cong., 2d Sess. 29 (1978), *reprinted* in [1978] U.S.Code Cong. & Admin.News pp. 9273, 9301. The failure to ratify this authorization was attributable to time constraints during the final hours of the 95th Congress. *See* 124 Cong.Rec. H13075 (daily ed. Oct. 14, 1978) (remarks of Rep. St. Germain).

[16] Because we hold that Section 1818(b) and (n) constitutes an explicit grant of rulemaking authority applicable to the instant regulation, it is unnecessary to consider whether or not the Comptroller, in any event, has inherent rulemaking authority to issue rules consistent with statutory objectives.

## THE REGULATION AND OTHER LAWS

IBAA next contends that the credit life regulation, by approving various methods which enable national banks themselves to provide credit life insurance,[17] violates other laws regulating the business of insurance. One statute purportedly in direct conflict with the challenged rule is 12 U.S.C. § 92 (1976). This legislation authorizes national banks in towns of 5,000 inhabitants or less to act as agents for life insurance companies; in appallant's view its language carries a clear implication that national banks in larger towns have no authority to so perform.[18] Unlike other forms of insurance coverage, however, credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business whether written in a town of over or under 5,000 inhabitants. Moreover, Congress has specifically granted national banks all incidental powers necessary to carry on the business of banking, 12 U.S.C. § 24 (1976), and as the record thoroughly establishes credit life insurance is now commonplace and essential where ordinary loans on personal security are involved.[19]

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[17] These methods include having bank employees who sell the insurance turn over all income to the bank as compensation for the use of its premises and good will (12 C.F.R. § 2-6(d)), refunding all such income to the loan customers (12 C.F.R. § 2.6(g)) and several other options. The list in § 2.6 is not meant to be exhaustive; moreover, no single method is mandatory under the regulation.

[18] Under 12 U.S.C. § 92, a national bank's authority to function as an agent is subject to such rules and regulations as the Comptroller may prescribe. By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies.

[19] In an analogous context, the Federal Reserve Board has found the sale of credit life insurance "so closely related to banking or managing or controlling banks as to be a proper incident thereto." *See* 12 U.S.C. § 1843(c)(8) *and* 12 C.F.R. §§ 225.4(a)(9)(ii),

The authorities cited by appellant, such as *Saxon v. Georgia Assn. of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968), and *Commissioner of Internal Revenue v. First Security Bank of Utah, NA*, 405 U.S. 394, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1974), are simply not in point. The first case did not involve credit life but rather banks' authority to sell broad forms of automobile, home, casualty and liability insurance. *See Saxon, supra*, 399 F.2d at 1012. The second involved no direct holding on the issue presented in this litigation.[20]

IBAA also suggests that the McCarran-Ferguson Act must be interpreted as prohibiting the credit life regulation since the regulation conflicts irreconcilably with some state insurance laws.[21] While it is true that the Act preserves to the states authority to regulate the relationship

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225.128(c). This finding has been sustained on judicial review. *Alabama Assn. of Insurance Agents* v. *Board of Governers of Fed. Res. Sys.*, 533 F.2d 224, 240-41 (5th Cir.), *modified*, 558 F.2d 729, 730 (1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978).

[20] The Supreme Court in *First Security Bank of Utah, supra*, 405 U.S. at 401-02, 92 S.Ct. 1085, simply adopted the litigants' assumption that a national bank in a town of more than 5,000 persons could not legally receive commission income for the sale of credit life insurance. That case involved the allocation, for tax purposes, of commissions earned in the sale of credit life insurance; the Court's "assumption" decided nothing concerning the meaning of 12 U.S.C. § 92. *See First Natl. Bank of La Marque* v. *Smith*, 436 F.Supp. 824, 832 (S.D.Tex. 1977).

[21] Under the McCarran-Ferguson Act, Pub.L.No. 79-15, 59 Stat. 33 (1945), codified in 15 U.S.C. §§ 1011 *et seq.* (1976), the business of insurance is subject to regulation by the states. Although appellant cites state laws in Oklahoma and Texas allegedly superseded by the challenged rule, its argument is not persuasive. Given that credit life insurance is entirely optional under the regulation, and that alternative methods for its sale are explored in depth at the state level, we are satisfied that the regulation will not cause national banks to violate these state laws.

between the insurance company and its policyholder, *Securities & Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), a rule affecting the disposition of credit life insurance income received by national bank insiders does not fall within the strictures of the statute. Nothing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate "unsafe and unsound" banking practices of national banks. This exercise of power over income dispensed internally among national bank personnel lies well beyond the core of protection furnished to state insurance laws under the Act. *See generally, Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 210-14, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). To be sure, the states may continue to regulate. All that is involved is the Comptroller's proper concern that banks under his supervision are not deprived of the benefits of business they generate by those who seek to take advantage of their positions as officers, directors or principal shareholders.

Appellant's claim for loss of competitive equality with state banks is without merit. There is no support from Congress or the courts for requiring such equality between state and national banks with respect to provision of credit life insurance or indeed in general. An extensive and long-standing network of statutory requirements governing national banks alone confirms the existence of a dual banking system. Moreover, it is puzzling if not inappropriate for banks to claim they are experiencing a "competitive disadvantage" as a result of a regulation which can only increase the earnings of banks themselves.

**RULEMAKING PROCEDURES**

Finally, IBAA points to the fact, raised during the rulemaking proceedings, that the Federal Deposit Insurance Corporation ("FDIC"), which supervises and insures most

state-chartered banks, has evolved less stringent regulations for dealing with the writing of credit life insurance by insiders. Appellant urges that the Comptroller's failure to address these more flexible alternative approaches in announcing the regulation artificially narrowed the scope of the proceedings in violation of accepted rulemaking standards. *See Home Box Office, Inc. v. FCC,* 185 U.S.App. D.C. 142, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *United States v. Nova Scotia Food Products Corp.,* 568 F.2d 240, 253 (2d Cir. 1977).

The Comptroller received some 200 comments over a fifteen-month period. He was not required to meet each separate comment head on when issuing his determination following the comment period. *See Automotive Parts & Accessories Assn. v. Boyd,* 132 U.S.App.D.C. 200, 407 F.2d 330, 338 (D.C. Cir. 1968). His task instead was to identify vital material questions raised during the proceedings and indicate the agency's response to these concerns. *See Home Box Office, Inc. v. FCC, supra; Automotive Parts & Accessories Assn. v. Boyd, supra.* This he did, facing directly both the principal legal and management objections in a full reasoned discussion.[22] His "concise general statement" was sufficient. There were no procedural errors in the announcement, promulgation or explanation of the challenged regulation.

Given the Comptroller's clear authority to regulate national banks so as to achieve sound banking practice, and the obvious conflict between congressional objectives and the credit life insurance activities of insiders prohibited by the regulation, we cannot find that the Comptroller has acted arbitrarily. According due deference to his expertise and finding no procedural or substantive infirmity, the regulation must be sustained. The District Court's order dismissing the complaint is affirmed on different grounds.

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[22] *See* 42 Fed.Reg. 48518-25 (1977).

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 78-2199

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
*Appellant*

v.

JOHN G. HEIMANN, Comptroller of the Currency
of the United States Department of Treasury

BEFORE: McGowan and Wilkey, Circuit Judges; and Gesell,* Judge, United States District Court for the District of Columbia

### ORDER

Filed February 1, 1980

Upon consideration of appellant's (Independent Bankers Assoc. of America) petition for rehearing, it is

ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

*Per Curiam*

For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-2189

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
*Plaintiff*,

v.

JOHN G. HEIMANN,
*Defendant*.

## MEMORANDUM AND ORDER OF DISMISSAL

Filed September 13, 1978

Plaintiff is a nonprofit Minnesota corporation which serves as a trade association for several hundred relatively small national banks which are its members. Plaintiff sues here to invalidate and enjoin enforcement of a Regulation published by the Comptroller of the Currency in 1977 relating to a practice engaged in by some banks with respect to income from the sale of credit life insurance. Comptroller of the Currency, "Disposition of Credit Life Insurance Income" (Final Regulation), 42 Fed. Reg. 37512 (1976). That insurance is purchased by an individual borrower for the benefit of a lending bank to which the insurance proceeds become payable in the event the borrower should die before the bank has been repaid.

The Regulation in question addressed the arrangements made by some banks for the payment of income generated by the sale of credit life insurance to their officers, directors, employees, and selected stockholders, as distinguished from payment of that income to the lending bank itself. The Regulation expressed the Comptroller's opinion that payment of income earned from the sale of credit life in-

surance to persons other than the bank itself or as a pro rata dividend to its shareholders was an unsafe and unsound business practice.

The matter is before the Court on defendant's motion to dismiss and the parties' cross-motions for summary judgment. In the preliminary injunction phase of this case, defendant contended that the Regulation established as a matter of law that a bank's non-pro rata distribution of credit insurance sales proceeds to officers, directors, stockholders, and employees was an unsafe and unsound banking practice. As a consequence, the defendant argued, any cease and desist proceeding against any bank which allegedly engaged in the practice would litigate only the question of whether the respondent bank had engaged in the practice; the issue of whether the practice was unsafe and unsound would have been decided, and any such defense contention would have been foreclosed, by the Regulation.

In this posture, the case raised difficult questions about the standing of the plaintiff association in terms of the extent, if any, to which it (as distinguished from its members) had suffered from, or was threatened by, the Regulation. More important, the case in its original posture put squarely at issue as an original question the underlying statutory authority of the Comptroller to issue binding regulations. The statutory interpretation problem was complicated by the fact that the laws creating the Comptroller's authority have been enacted by Congress piecemeal since 1863. These scattered statutes do not specifically authorize regulations of the sort issued by many other administrative agencies. *Compare, e.g., National Petroleum Refiners Association v. F.T.C.*, 482 F.2d 672 (D.C. Cir.), *cert. denied,* 415 U.S. 951 (1973). Most importantly, legislation which would clearly give the defendant the rulemaking authority he claimed is now under active consideration in Congress suggesting at least inferentially that the Comptroller does not have such authority at present, and that

Congress is the more appropriate body to resolve the present doubts about the Comptroller's power to issue binding regulations. *Compare American Automobile Association v. United States,* 367 U.S. 687, 697 (1961). H.R. 13088, 95th Cong., 2d Sess., June 12, 1978.

The defendant has since conceded, however, that:

> [a]lthough the Comptroller's initial response to the Court's question at the hearing on plaintiff's motions for a temporary restraining order and for a preliminary injunction indicated that a national bank would be precluded from attacking the validity of the regulation in the course of an administrative proceeding under 12 U.S.C. § 1818(b) (Transcript at 52), it would appear that, upon studied reflection, a national bank would be able to challenge the validity of the regulation and present the defense that its activities are in fact safe and sound practices both during the administrative proceeding and during judicial review in the appropriate court of appeals, particularly where a regulation has not previously been the subject of judicial review. Memorandum of Points and Authorities in Support of Defendant Comptroller's Motion to Dismiss at 28, n. 19.

The Court accepts this concession by defendant as binding upon it and therefore as dispositive of this case. The concession reduces the Regulation to a statement of defendant's informed, expert, and well-reasoned opinion about the practice of some banks and of the defendant's intention to exercise its clear statutory authority to initiate cease and desist actions to stop the practice. Defendant's concession effectively ends any threat to attempt to employ the Regulation in any cease and desist proceeding as a bar to any bank's defense of the soundness and safety of its practices. Thus, defendant has already given the plaintiff all the relief which the Court could effectively provide if it decided in plaintiff's favor the complex issues here raised.

Accordingly, the defendant's motion to dismiss should be and is hereby GRANTED.

/s/ LOUIS F. OBERDORFER
United States District Judge

Dated: September 13, 1978

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-2189

INDEPENDENT BANKERS ASSOCIATION OF AMERICA, *Plaintiff*,

v.

JOHN G. HEIMANN, *Defendant*.

## MEMORANDUM AND ORDER

Filed October 11, 1978

Defendant moves to modify the Court's Memorandum and Order of Dismissal of September 13, 1978, because of concern about the statement that:

> . . . the laws creating the Comptroller's authority . . . do not specifically authorize regulations of the sort issued by many other administrative agencies.

The defendant expresses concern that the statement could result in unfounded attacks on the Comptroller's rule-making authority in future litigation or enforcement actions involving this and other agency rules.

Defendant correctly observes that the Court determined not to decide this issue. Therefore, there is no basis for defendant's expressed concern that future parties or courts might misconstrue the Court's opinion as deciding something it did not decide.

The defendant also contends that the Court misunderstood its concession. Having carefully reviewed defendant's concessions in its brief and in oral argument and the Court's September 13 Memorandum and Order, the Court

is satisfied that there is no essential difference between concession relied upon by the Court and the defendant's post-judgment restatement of it. The opinion specifically recognized defendant's clear statutory authority to initiate cease and desist actions to stop the practices addressed by the Regulation. At oral argument, in its footnote 19, and now in its postjudgment memorandum, defendant clearly concedes the right of a respondent in a cease and desist proceeding to challenge the Regulation as exceeding the Comptroller's authority, as otherwise improperly promulgated, or as arbitrary and capricious, or to present as a defense to the proceeding the safety and soundness of the challenged practice. Defendant objects, however, to the Court's observation that the "concession reduces the Regulation to a statement of defendant's informal, expert and well-reasoned opinion about the practice of some banks." The ultimate point of this possibly too rhetorical statement is that the Court did not decide the validity of the Regulation, and left that issue for decision in a cease and desist proceeding. In order to avoid confusion, the offending sentence will be stricken.

Accordingly, the Memorandum and Order of September 13, 1978, is MODIFIED by deleting the second sentence of the second full paragraph of page three, and

Defendant's Motion to Modify Opinion is GRANTED to the extent of the above modification and DENIED as to all other requested modifications, and

Plaintiff's motion to vacate the order of dismissal, to direct defendant to withhold publication of bulletin and to grant further relief is DENIED.

/s/ LOUIS F. OBERDORFER
United States District Judge

Dated: October 11, 1978

## APPENDIX E

The Financial Institutions Supervisory Act of 1966, § 202, 12 U.S.C. § 1818(b) (1976) (prior to 1978 amendment), provides as follows:

> (1) If, in the opinion of the appropriate Federal banking agency, any insured bank or bank which has insured deposits is engaging or has engaged, or the agency has reasonable cause to believe that the bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank, or any written agreement entered into with the agency, the agency may issue and serve upon the bank a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of the bank. Unless the bank shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank an order to cease and desist from any such violation or practice. Such order may, by provi-

sions which may be mandatory or otherwise, require the bank and its directors, officers, employees, and agents to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the bank concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c), (d), (h), (i), (k), (l), (m), and (n) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a holding company, as those terms are defined in the Bank Holding Company Act of 1956, in the same manner as they apply to a State member insured bank.

## APPENDIX F

The Financial Institutions Supervisory Act of 1966, § 202, 12 U.S.C. § 1818(n) (1976) (prior to 1978 amendment), provides as follows:

> In the course of or in connection with any proceeding under this section, the agency conducting the proceeding, or any member or designated representative thereof, including any person designated to conduct any hearing under this section, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpena duces tecum; and such agency is empowered to make rules and regulations with respect to any such proceedings. The attendance of witnesses and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place where such proceeding is being conducted. Any party to proceedings under this section may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesses subpenaed under this section shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any court having jurisdiction of any proceeding instituted under this section by an insured bank or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the bank or from its assets.

## APPENDIX G

The McCarran-Ferguson Act, § 2, 15 U.S.C. § 1012 (1976), as amended, provides as follows:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

## APPENDIX H

Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, amending the National Bank Act (12 U.S.C.A. § 92), provides as follows:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which such bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Provided, however,* That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

## APPENDIX I

Disposition of Credit Life Insurance Income, 12 C.F.R. Part 2 (1979), provides as follows:

§ 2.1 Authority.

This part is issued by the Comptroller of the Currency under the general authority of the national banking laws, 12 U.S.C. 1 et seq., and under the specific authority of 12 U.S.C. 24(7), 60, 73, 92 and 1818(b).

§ 2.2 Scope and purpose.

(a) This part applies to sales of credit life, health and accident insurance ("credit life insurance") by employees, officers, directors and principal shareholders of a national bank and by corporations, partnerships, associations or other entities in which such persons have an interest of more than 5 percent.

(b) The purposes of this part are (1) to prohibit employees, officers, directors and principal shareholders of national banks from benefitting personally on the sale of credit life insurance to loan customers and (2) to encourage marketing of credit life insurance through the use of bank facilities only under arrangements which assure that employees, officers, directors and principal shareholders do not receive benefits not shared with all stockholders of the bank.

§ 2.3 Definitions.

(a) "Bank" means a national banking association or a bank located in the District of Columbia and subject to the supervision of the Comptroller of the Currency.

(b) "Interest" shall include:

(1) Ownership through a spouse or minor children;

(2) Ownership through a broker, nominee or other agent;

(3) Ownership through a corporation, partnership, association, joint venture or proprietorship controlled by a director, officer, employee or principal shareholder of the bank.

(c) "Principal shareholder" means any shareholder who directly or indirectly owns or controls an interest of more than 5 percent in the bank's outstanding shares.

(d) The terms "officer," "director," "employee" and "principal shareholder" shall include the spouse and minor children of such officer, director, employee or principal shareholder.

(e) The term "credit life insurance" means credit life, health and accident insurance, sometimes referred to as credit life and disability insurance.

§ 2.4 Distribution of credit life insurance income.

(a) No bank employee, officer, director or principal shareholder may retain commissions or other income from the sale of credit life insurance in connection with any loan made by the bank. Except as provided in subsequent paragraphs of this section, retention of credit life insurance income by such persons or by corporations, partnerships, associations or other entities in which such persons have an interest of more than 5 percent is an unsafe and unsound banking practice.

(b) Income from the sale of credit life insurance to loan customers may be credited to an affiliate of the bank: *Provided,* That income in proportion to shares held by the bank's minority shareholders (other than directors) is placed in trust and paid to them periodically.

(c) Other permissible arrangements for the distribution of credit life insurance income include:

(1) Where the bank is wholly owned (except for directors' shares) by a holding company, income from the sale of credit life insurance may be credited either to an affiliate which is also wholly owned or to the holding company;

(2) Where there is no holding company, income from the sale of credit life insurance may be credited to an affiliate whose shareholders are identical to those of the bank;

(3) Income from the sale of credit life insurance may be credited to a trust for the benefit of all shareholders of the bank, or to a corporation or wholly owned subsidiary thereof whose stock is held in trust for the benefit of all shareholders.

(d) Nothing in this section shall be construed to prohibit a bank employee, officer, director, or principal shareholder who holds an insurance agent's license from agreeing to compensate the bank for the use of its premises, employees and good will; *Provided,* That all income received by said employee, officer, director, or principal shareholder from this activity is turned over to the bank as compensation.

§ 2.5 Responsibilities of directors.

(a) The selection of an insurance underwriter, the agreements between the underwriter and the bank or its employees, officers, directors, or principal shareholders, and the manner in which income from the sale of credit life insurance is distributed shall be approved by an appropriate resolution of the bank's board of directors. Such resolution shall set forth the name of the underwriter(s), a description of the agreement with the underwriter as to the collection of premiums and the disbursement thereof, and a discussion of the manner in which income from the sale of credit life insurance is to be allocated. However, the requirements

of this paragraph shall not apply where (1) all income from the sale of credit life insurance is credited to the income accounts of the bank and no employee, officer, director, or principal shareholder receives a personal benefit from such sales, or (2) where the bank is wholly owned by a holding company (except directors' qualifying shares) and the credit life insurance income is credited either to an affiliate that is also wholly owned or to the holding company.

(b) When carrying out their responsibilities under paragraph (a) above, the directors shall observe the rules in § 2.4, and shall be mindful of their duty under both the common law and 12 U.S.C. 73 to promote and advance the interests of the bank over their own personal interests.

§ 2.6 Methods of selling credit life insurance.

Pursuant to 12 U.S.C. 24(7), a bank may furnish credit life insurance to its loan customers by any of the methods listed below. Where state insurance laws or other legal considerations appear to preclude the use of a particular method, a bank may select an alternative that complies with § 2.4 of this regulation. The list below is not intended to be exclusive.

(a) A bank may act as agent for the sale of credit life insurance and receive income in the form of commissions.

(b) An employee, officer, director, or principal shareholder may be licensed as an insurance agent for the sale of credit life insurance to loan customers, provided the rules in § 2.4 are observed.

(c) A bank may acquire a group credit life insurance policy and provide coverage thereunder to loan customers. A bank that makes credit life insurance coverage available by means of a group policy may

receive experience refunds, dividends or retrospective rate credits as provided in the policy.

(d) As compensation for the use of its premises, personnel and good will, a bank may contract with an employee, officer, director or principal shareholder to receive income payable to said individual from the sale of credit life insurance: *Provided,* That said individual is obligated in the contract to pay over to the bank all of the income received.

(e) A bank may accept reimbursement from an insurance company for services rendered by the bank in selling credit life insurance, maintaining an account to receive premiums, disbursing premiums to the underwriter, and issuing a statement of account on a periodic basis.

(f) A bank may provide credit life insurance coverage to borrowers at its own expense.

(g) A bank may refund to its loan customers who purchase credit life insurance all commissions, experience refunds or other income received from the underwriter.

§ 2.7 Reserved authority.

The Comptroller reserves the right to give written approval to a bank's request to modify the applicability of this part to that bank because of that bank's particular circumstances. Modifications will be granted only where assurance is provided that the overall purposes of the regulation will be achieved within a short time after its effective date. Applications for modification should be addressed to the Comptroller of the Currency, Washington, D.C. 20219, in the form of a letter approved by the board of directors and accompanied by an indication of the number of dissenting directors and a summary of their views. A copy of

such application should simultaneously be provided to the appropriate Regional Administrator. All applications and their disposition by the Comptroller will be available for public inspection at the Washington, D.C. office.

Supreme Court, U. S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

No. 79-1705

# In the Supreme Court of the United States

OCTOBER TERM, 1979

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
PETITIONER

*v.*

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 613 F. 2d 1164. The orders of the district court (Pet. App. 14a-19a) are not reported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on December 28, 1979. A petition for rehearing was denied on February 1, 1980 (Pet. App. 13a). The petition for a writ of certiorari was filed on April 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818(b) and (n), authorizes the Comptroller of the Currency to adopt a regulation forbidding employees, officers, directors or principal shareholders of a national bank from retaining commissions or other income from the sale of credit life insurance in connection with a loan made by the bank.

2. Whether the Comptroller's regulation constitutes an improper attempt to regulate the business of insurance, in violation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*

3. Whether the Comptroller's regulation permits national banks to provide general insurance services that exceed the authority granted under the National Bank Act, ch. 461, 39 Stat. 752, 12 U.S.C. 21 *et seq.*

## STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth at Pet. App. 20a-22a and 25a-30a.

## STATEMENT

1. This case concerns the validity of a regulation promulgated by the Comptroller of the Currency to prevent insiders of national banks from personally profiting from the sale of credit life, health and accident insurance ("credit life insurance"). Credit life insurance protects a creditor bank against losses resulting from the death or disability of its borrowers. Such insurance is now widely provided by banks to secure consumer loans (Pet. App. 5a-6a).

The Comptroller initiated rulemaking proceedings under the Financial Institutions Supervisory Act of 1966, 12 U.S.C. 1818. That Act authorizes the Comptroller to

issue cease and desist orders against national banks engaged in any "unsafe or unsound" banking practice. 12 U.S.C. 1818(b). It also authorizes the Comptroller to issue cease and desist orders to prevent violations of any "rule or regulation" applicable to national banks. *Ibid.* In addition, the Comptroller is expressly empowered "to make rules and regulations" that apply to proceedings brought to restrain unsafe or unsound banking practices. 12 U.S.C. 1818(n).

The Comptroller published the text of his proposed regulation for public comment in July 1976. See 41 Fed. Reg. 29846 (1976). The proposed regulation declared that retention of credit life income by employees, officers, directors and principal shareholders of a national bank is an "unsafe and unsound banking practice" within the meaning of Section 1818(b).[1] Thereafter, more than 200 comments were received from various persons, including the Federal Trade Commission, national banks, trade associations, and consumer groups. In September 1977, the Comptroller published the final text of his regulation, to become effective in January 1978. See 12 C.F.R. 2. At that time, the Comptroller explained that retention of credit life income by bank insiders is a form of self-dealing and that similar conduct has caused many bank failures in recent years. The Comptroller pointed out that a loan officer's judgment on the quality of a loan can be

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[1]The Comptroller explained (Pet. App. 25a) that the purpose of the regulation is to "prohibit employees, officers, directors and principal shareholders of national banks from benefitting personally on the sale of credit life insurance to loan customers" and to "encourage marketing of credit life insurance through the use of bank facilities only under arrangements which assure that employees, officers, directors and principal shareholders do not receive benefits not shared with all stockholders of the bank."

influenced adversely by the possibility of receiving direct financial rewards for making the loan and selling the borrower credit life insurance. See 42 Fed. Reg. 48518, 48524 (1977).

2. In December 1977, petitioner Independent Bankers Association of America brought this action in the United States District Court for the District of Columbia to enjoin the Comptroller from enforcing his regulation. The district court dismissed the complaint, holding that the issues presented were not ripe for adjudication. The court concluded that the regulation was merely a statement of opinion rather than an enforceable legal standard (Pet. App. 16a). The Comptroller thereafter sought a modification of the court's opinion, explaining that his regulation is a substantive rule with the force of law. The district court subsequently modified its opinion (*id.* at 18a), but reaffirmed that it was unnecessary to "decide the validity of the Regulation." The court "left that issue for decision in a cease and desist proceeding" (*id.* at 19a).

The court of appeals affirmed the district court's order dismissing the complaint (Pet. App. 1a-12a). However, the court upheld the Comptroller's regulation on the merits. The court found that the complaint was ripe for adjudication and that petitioner had standing to bring this action. The court held that the Comptroller had authority to issue the challenged regulation and that the regulation was consistent with both the National Bank Act, ch. 461, 39 Stat. 752, 12 U.S.C. 21 *et seq.*, and the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*

## ARGUMENT

This is the first case involving the validity of a regulation issued by one of the federal bank regulatory agencies that specifies that a particular banking practice is

"unsafe or unsound" under the Financial Institutions Supervisory Act of 1966.[2] Accordingly, there are no decisions that conflict with the decision of the court below. In addition, the decision has little continuing importance because Congress has recently enacted a statute that broadens the rulemaking authority of the Comptroller and removes any doubt that he may adopt substantive rules defining "unsafe and unsound" banking practices. Review by this Court of the decision of the court of appeals is therefore unwarranted.

1. *a.* Petitioner contends (Pet. 8-14) that the Financial Institutions Supervisory Act authorizes the Comptroller to adopt only procedural rules, not substantive regulations. However, 12 U.S.C. 1818(b) empowers the Comptroller to issue cease and desist orders to prevent national banks from engaging in any "unsafe or unsound practice" in the conduct of its banking business and also authorizes the Comptroller to restrain the violation of any "rule or regulation" applicable to national banks. In addition, 18 U.S.C. 1818(n) authorizes the Comptroller to "make rules and regulations" with respect to cease and desist proceedings involving unsafe or unsound banking practices. The Financial Institutions Supervisory Act thus provides a sufficient basis for the Comptroller's rule. The rule defines the statutory term "unsafe or unsound practice" and provides specific standards in cease and desist proceedings brought by the Comptroller. It also notifies national bank employees that particular behavior is deemed by the Comptroller to be improper and thus

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[2]Under that Act, the Comptroller, the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Federal Home Loan Bank Board may proceed administratively against "unsafe or unsound" banking practices within their respective jurisdictions. See 12 U.S.C. 1818(b), (n); 12 U.S.C. 1464(d)(2)(A).

promotes statutory compliance without the need for formal cease and desist proceedings. As the court of appeals explained (Pet. App. 7a):

> [A] regulation giving advance notice of conduct which the Comptroller disapproves as threatening to the safety and soundness of the banks he regulates is wholly consistent with the statutory scheme. The Comptroller was given authority to promulgate regulations in order to facilitate execution of his statutory powers. *See* 12 U.S.C. §1818(n). It would undermine the regulatory purpose of Congress to assume that the Comptroller must proceed solely by separate "cease and desist" cases. His ability to forewarn by specifying and clarifying the nature and scope of his concerns will at the same time minimize the necessity for recurrent and costly investigation into the conduct of the many individual banks under his supervision.

As the court of appeals also pointed out (Pet. App. 8a), the statutory language here involved is quite similar to that previously found to be a sufficient predicate for the adoption of substantive rules. See, *e.g.*, *National Petroleum Refiners Ass'n* v. *FTC*, 482 F. 2d 672 (D.C. Cir.), cert. denied, 415 U.S. 951 (1974). Both the Financial Institutions Supervisory Act, 12 U.S.C. 1818(b), (n), and the Federal Trade Commission Act, 15 U.S.C. 45(a), authorize the administrative agency to take action to redress broadly defined commercial problems (*i.e.*, "unsafe or unsound practices" in banking, and "unfair or deceptive acts or practices" in commerce), and to promulgate regulations in aid thereof (see Pet. App. 8a & n.14).

Although the decision below is the first decision dealing explicitly with the Comptroller's rulemaking authority in this area, the Fifth Circuit previously has held that the Comptroller possesses authority to adopt substantive standards relating to the disposition of funds obtained from the sale of credit life insurance. See *First National Bank of LaMarque* v. *Smith*, 610 F. 2d 1258 (5th Cir. 1980), upholding the Comptroller's authority to issue directives to national banks requiring them to cease allowing insiders to benefit personally from the sale of credit life insurance. In sustaining the Comptroller's broad authority in this area, the court explained (610 F. 2d at 1263-1264):

> Appellants assert the Comptroller has no authority to issue a substantive directive regarding the handling of credit life insurance by a national bank. We disagree. The Comptroller has not acted arbitrarily or capriciously, or abused his discretion in this case. See 5 U.S.C. § 706(2) (1976). The letter directives sent to the appellant banks constitute a lawful exercise of the Comptroller's authority to prevent national banks from engaging in unsafe and unsound banking practices under 12 U.S.C. §1818(b) (1976).

See also *Groos National Bank* v. *Comptroller of the Currency*, 573 F. 2d 889, 897 (5th Cir. 1978):

> The phrase "unsafe or unsound banking practice" is widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.

Accord, *First National Bank of Eden* v. *Department of the Treasury*, 568 F. 2d 610, 611 & n.2 (8th Cir. 1978)

The decision of the court of appeals, upholding the Comptroller's authority to define "unsafe or unsound banking practices," is also consistent with this Court's recognition that the bank regulatory agencies have broad authority to preserve the soundness of the nation's financial institutions (*Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978)) and that considerable deference is owing to interpretations by the bank regulatory agencies of their own enabling statutes. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441, 450 (1947) (Rutledge and Frankfurter, JJ., concurring); see also *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 10.

*b.* In any event, the question whether the court of appeals correctly construed the Comptroller's rulemaking authority under the Financial Institutions Supervisory Act of 1966 has little continuing importance. On March 31, 1980, the President signed into law the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132. Section 708 of that Act strengthens the Comptroller's rulemaking authority by adding a new statutory provision (to be codified at 12 U.S.C. 93a) that states:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority

> conferred by this section does not apply to section 5155 of the Revised Statutes or to securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'[3]

Thus, even if petitioner were correct in its contention that the Financial Institutions Supervisory Act of 1966 does not confer substantive rulemaking authority on the Comptroller, the new enactment fills any statutory void.

2. Petitioner also argues (Pet. 14-17) that the Comptroller's regulation violates the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.* The court of appeals correctly rejected that contention, explaining that (Pet. App. 10a-11a):

> While it is true that the [McCarran-Ferguson] Act preserves to the states authority to regulate the relationship between the insurance company and its policyholder * * * a rule affecting the disposition of credit life insurance income received by national bank insiders does not fall within the strictures of the statute. Nothing in the McCarran-Ferguson Act was intended to affect the power of the Comptroller under authority of Congress to regulate "unsafe and unsound" banking practices of national banks. This exercise of power over income dispensed internally among national bank personnel lies well beyond the core of protection furnished to state insurance laws under the Act.

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[3]As the court of appeals noted (Pet. App. 8a n.15), the legislative history of this provision shows that it was meant to clarify the Comptroller's existing rulemaking authority rather than create new authority. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 29 (1978).

Moreover, because the Comptroller's regulation does not require banks to sell credit life insurance at all and various alternative methods for its sale are available in every state, there is no basis for petitioner's contention that the regulation would compel national banks to violate state insurance laws. See Pet. App. 10a & n.21; *First National Bank of LaMarque* v. *Smith*, *supra*, 610 F. 2d at 1263; see also the statement of basis and purpose accompanying the Comptroller's regulation (42 Fed. Reg. 48519-48520 (1977)).

3. Petitioner finally argues (Pet. 17-19) that Section 92 of the National Bank Act, ch. 461, 39 Stat. 753, bars the Comptroller from adopting the regulation here involved because the regulation permits national banks to act as agents for the sale of credit insurance (within specified limitations) in cities with more than 5,000 inhabitants.[4] That contention is fully answered in the opinion of the court of appeals and the statement of basis and purpose accompanying the Comptroller's regulation. As the court explained (Pet. App. 9a):

> This legislation [Section 92] authorizes national banks in towns of 5,000 inhabitants or less to act as agents for life insurance companies; in appellant's view its language carries a clear implication that national banks in larger towns have no authority to

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[4]Section 92 authorizes national banks to operate as agents for life insurance companies in towns having less than 5,000 inhabitants. As the court of appeals noted, "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies" (Pet. App. 9a n.18).

By error, Section 92 has been omitted from the United States Code. See *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972); *First National Bank of Lamarque* v. *Smith*, *supra*, 610 F. 2d at 1261-1262 n.6.

> so perform. Unlike other forms of insurance coverage, however, credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business whether written in a town of over or under 5,000 inhabitants. Moreover, Congress has specifically granted national banks all incidental powers necessary to carry on the business of banking, 12 U.S.C. 24, and as the record thoroughly establishes credit life insurance is now commonplace and essential where ordinary loans on personal security are involved.

The Comptroller also pointed out in his statement of basis and purpose (42 Fed. Reg. 48518 (1977)) that:

> [i]n the field of consumer credit, credit life insurance is probably the preeminent form of security taken by financial institutions today. Since the use of credit life insurance as security is now routine in the making of loans, acting as agent for that sale is plainly incidental to the power of national banks to loan money on personal security. Hence, national banks in towns of more than 5,000 that act as agent, either in their own right or through licensed employees, for the sale of credit life insurance are not engaged in the general insurance agency business contemplated by [Section 92]. Rather, they are lawfully making available to loan customers a highly specialized form of insurance peculiarly related to the business of banking and not generally available from insurance agencies unaffiliated with financial institutions.

Contrary to petitioner's assertion (Pet. 18), no court has held that the Comptroller lacks power to prescribe the circumstances under which national banks may provide credit life insurance in connection with loans made by the

bank. *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F. 2d 1010, 1012 (5th Cir. 1968), concluded that national banks could not provide broad categories of automobile, home, casualty and liability insurance. *Saxon* did not hold that the Comptroller is powerless to adopt rules governing the limited credit life insurance practices of national banks.[5]

*Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972), is also irrelevant to the issue presented here. That case considered the federal income tax obligations of a national bank that received proceeds from the sale of credit insurance. The Court did not pass judgment on the Comptroller's authority to adopt regulations specifying that banks, rather than their employees, should receive commissions from the sale of credit insurance. In deciding the narrow tax question before it, the Court merely "assume[d] for the purposes of this decision that the Banks were

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[5]In promulgating his regulation, the Comptroller stressed the essential distinction between the insurance activities considered in *Saxon* and those involved here (42 Fed. Reg. 48518-48519) (1977)):

> In *Saxon*, the independent insurance agents sought to enjoin Citizens and Southern National Bank from * * * [operating] * * * a general insurance agency through which the bank acted as agent for the sale of property and liability insurance * * *. Since the types of insurance for which the bank acted as agent are commonly sought by the public outside the credit granting process, are a staple of the independent insurance agent and are characteristically sold by a general agency operation, it seems clear that the facts of this case are not controlling where a bank acts as agent in its own right or through a licensed employee for the sale of credit life insurance in connection with a specific loan—a type of insurance which * * * frequently serves in lieu of collateral or a guarantee and is not normally available from independent agencies.

This position is consistent with the regulations promulgated by the Comptroller following *Saxon*. See 12 C.F.R. 2.1-2.5 (1971).

prohibited from receiving insurance-related income * * *" (405 U.S. at 402).[6] As the court below correctly observed (Pet. App. 10a), the "assumption" in *First Security Bank of Utah* is not a decision on the requirements of Section 92. See also 42 Fed. Reg. 48519 (1977).[7]

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[6]The decision of the court of appeals in *First Security Bank of Utah* rested on the finding of the Tax Court that "the banks believed that it would be contrary to federal banking law to receive income resulting from their customers' purchase of credit insurance and that they have never received commissions or reinsurance premiums arising from credit insurance transactions." *First Security Bank of Utah, N.A.* v. *Commissioner of Internal Revenue*, 436 F. 2d 1192, 1196 (10th Cir. 1971). The court of appeals adopted a multi-factor analysis in reaching the conclusion that the banks did not "earn" income from their insurance activities. *Id.* at 1198. The court's comments on the scope of Section 92 (*ibid.*) were unnecessary to the resolution of the tax law question before the court. See 405 U.S. at 402 (assuming the correctness of the parties' uncontested interpretation of Section 92 in order to decide the case).

[7]No court except the court below has had occasion to consider the validity under Section 92 of a regulation permitting national banks to engage in the limited activity of providing credit life insurance incidental to extending consumer loans, and no other court has had the benefit of the Comptroller's expert views on that issue. See *Ford Motor Credit Co.* v. *Milhollin*, *supra*. Moreover, as noted above, the Comptroller's regulation does not *require* banks to receive commissions from the sale of credit life insurance. It merely offers that as one of several alternatives to a banking practice that the Comptroller has determined to be unsafe and unsound (Pet. App. 26a). Petitioner does not challenge the Comptroller's finding that the receipt of credit life insurance income by bank insiders is an unsound banking practice that can impair the safety of bank loans.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 79-1705

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

INDEPENDENT BANKERS ASSOCIATION OF AMERICA,
*Petitioner,*

v.

JOHN G. HEIMANN, Comptroller of the Currency of the United States Department of the Treasury,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF OF PETITIONER INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## REPLY BRIEF OF PETITIONER INDEPENDENT BANKERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Independent Bankers Association of America ("IBAA") submits this reply brief in support of its petition for a writ of certiorari.

The Comptroller contends that this Court should not grant IBAA's petition because the lower court's decision "has little continuing importance" due to the recent enactment of the Depository Institutions De-

regulation and Monetary Control Act of 1980 (the "Deregulation Act"), which confers upon the Comptroller general authority to issue legislative regulations. (Resp. Brief at 5.) That argument ignores the continuing precedential effect of the far-reaching rules of law established by the court of appeals' decision. Specifically, the lower court effectively held that a federal agency may possess *inherent* power to issue legislative rules, and that court sharply narrowed the scope of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

The enactment of the Deregulation Act does not in any manner limit the force of the lower court's decision as a precedent. Unless this Court addresses that decision, the principles articulated by the lower court will remain binding on all panels of the District of Columbia Circuit. *Brewster* v. *C.I.R.*, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied,* 100 S. Ct. 522 (1979). The significance of reviewing these precedents, particularly the inherent rulemaking authority determination, is heightened by the fact that the District of Columbia Circuit reviews far more administrative agency actions than any other circuit.[1]

## RULEMAKING AUTHORITY

The decision below held that a court may confer legislative rulemaking authority on a federal agency if the court determines that (1) such authority would aid the agency in the performance of its duties and (2) Congress has not clearly stated that the agency lacks

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[1] Annual Report of the Director of the Administrative Office of the United States Courts, 1979, Table 6 (printed in Reports of the Judicial Conference—Report of the Administrative Office of the United States Courts (1979) at 200).

such authority. The lower court's ruling already has been cited for the principle that agencies have inherent powers to effectuate statutory purposes.[2] This landmark precedent concerning inherent rulemaking power obviously has not been vitiated by the Deregulation Act.

The Comptroller also contends that "there are no decisions that conflict with the decision of the court below." (Resp. Brief at 5.) This argument ignores the conflict between the lower court's holding concerning inherent rulemaking authority and the fundamental principle, repeatedly articulated by this Court, that a federal agency may issue legislative regulations only if Congress has expressly delegated this power to the agency. *Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). *See also General Electric Company* v. *Gilbert,* 429 U.S. 125, 141-142 (1976). *Compare American Telephone and Telegraph Co.* v. *United States,* 299 U.S. 232, 235-237 (1936) *with Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

Furthermore, it should be noted that the Comptroller does not argue that this issue has been mooted by the Deregulation Act. If this Court allows the lower court's ruling to stand, IBAA member national banks and other national banks will continue to be bound by a regulation that the Comptroller has no authority to promulgate. The new legislation does not operate retroactively to overcome deficiencies in the Comptroller's rulemaking authority which existed at the time of the Credit Life Regulation's adoption. Therefore, if the

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[2] Letter from Douglas M. Costle, Administrator of EPA, to E. G. Ratering, General Motors Corporation, denying "Petition for Reconsideration of Noise Emission Standards for Truck-Mounted Solid Waste Compactors" at 6. (March 10, 1980).

Comptroller wished to promulgate the Credit Life Regulation under his new statutory authority, he would be required to commence another rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553.

With regard to the question of whether the lower court correctly ruled that 12 U.S.C. §§ 1818(b) and (n) authorize the Comptroller to issue the Credit Life Regulation as a legislative rule, the Comptroller relies on the legal generalizations that the bank regulatory agencies have broad authority to preserve the soundness of the nation's financial institutions and that considerable deference is owing to interpretations by bank regulatory agencies of their own enabling statutes. (Resp. Brief at 8.) These statements, while having meaning in appropriate situations, do not permit the Comptroller or the courts to create substantive rulemaking authority where neither the plain language of the purported rulemaking statute nor its legislative history reflect that Congress intended to delegate such authority to the agency. As this Court has noted, "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."[3] Neither the plain language of 12 U.S.C. § 1818(b), which relates solely to cease-and-desist adjudicative proceedings, nor the plain language of 12 U.S.C. § 1818(n), which authorizes merely procedural rules, even suggest that in enacting 12 U.S.C. § 1818 Congress intended to confer legislative rulemaking power on the Comptroller. Moreover, there is absolutely nothing in the legislative history of Section 1818 which indicates congressional intent to authorize the Comptroller to issue legislative rules.

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[3] Morton v. Ruiz, 415 U.S. 199, 237 (1974).

In connection with the question of congressional intent, the Comptroller asserts that the legislative history of the Deregulation Act's rulemaking provision "was meant to clarify the Comptroller's existing rulemaking authority rather than create new authority." (Resp. Brief at 9, n.3.) Curiously, in support of this assertion he cites a House of Representatives report concerning a bill which was introduced in a previous Congress but not enacted. More pertinent sources of legislative intent are the reports concerning the Deregulation Act prepared by the Congress which passed that act, the Ninety-Sixth Congress. Those legislative documents say nothing about "clarifying" the Comptroller's rulemaking authority; to the contrary, the legislative history categorically states that the act *grants* him such authority. For example, the Senate report notes that "[a]nother amendment gives the Comptroller rulemaking authority under the Financial Institutions Supervisory Act in order to permit the Comptroller to go forward and prohibit unsafe or unsound banking practices. This authority is already possessed by the Federal Reserve and the FDIC."[4] Thus, far from supporting the Comptroller's contention that he already possessed rulemaking powers, the legislative history shows that Congress gave him this authority because it was of the view that he did not possess it.

The Comptroller also states that ". . . the Fifth Circuit previously has held that the Comptroller possesses authority to adopt substantive standards relating to the disposition of funds obtained from the sale of credit life insurance," citing *First National Bank of*

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[4] S. Rep. No. 96-368, 96th Cong., 1st Sess. 13 (1979).

*LaMarque* v. *Smith,* 610 F.2d 1258 (5th Cir. 1980). (Resp. Brief at 7.) The Comptroller does not specify what he means by "substantive standards," but that term certainly cannot mean legislative rules because the *LaMarque* court explicitly distinguished the Comptroller's informal directive, which was at issue in that case, from the Credit Life Regulation. *Id.* at 1264-5, n.9. Thus, the *LaMarque* case provides no support for the proposition that the Comptroller possesses substantive rulemaking authority to issue the Credit Life Regulation.

## THE McCARRAN-FERGUSON ACT

In its petition IBAA has additionally sought review of the lower court's ruling that the Credit Life Regulation does not violate the McCarran-Ferguson Act, which reserves to the states the authority to regulate the business of insurance except where Congress has enacted a statute which specifically relates to the business of insurance.

As in the case of the lower court's rulemaking precedent, the McCarran-Ferguson Act ruling raises an important federal question whose significance is not limited in any manner by the enactment of the Deregulation Act. Specifically, in upholding the regulation, the court reasoned that the McCarran-Ferguson Act was not intended to affect the Comptroller's power to regulate unsafe and unsound banking practices. Under the court's analysis, the Comptroller and other federal agencies which oversee financial institutions can regulate bank activities which are part of the business of insurance by characterizing such practices as unsafe or unsound banking practices. The court's holding

thereby renders the McCarran-Ferguson Act virtually inapplicable to insurance activities of banks.

In his brief in opposition the Comptroller argues that the regulation ". . . does not require banks to sell credit life insurance . . ." and, therefore, ". . . there is no basis for petitioner's contention that the regulation would compel banks to violate state insurance laws." (Resp. Brief at 10.) This argument takes no account whatsoever of the fact that the Credit Life Regulation prohibits certain categories of *state-qualified* individuals from acting as insurance agents and authorizes national banks to act as insurance agents even though certain states prohibit them from so acting. The regulation thus overrides state laws pertaining to who can be an insurance agent. It is this overlay of federal regulation over state law which the McCarran-Ferguson Act prohibits. In other words, federal regulations run afoul of the McCarran-Ferguson Act if they intrude into an area of insurance regulation already occupied by the states. The illegality of such federal regulations thus does not depend upon a further showing that the regulated party could comply with the federal regulations only if it violated state law.

Since almost all fifty states have enacted statutes which authorize individuals, including bank personnel, to act as credit life insurance agents and several states bar national banks from acting as insurance agents, the Credit Life Regulation, by creating an additional layer of regulation which establishes the Comptroller's own peculiar requirements, violates the McCarran-Ferguson Act. *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company of America*, 359

U.S. 65, 67 (1959). *See also Lawyer's Realty Corporation* v. *Peninsular Title Insurance Co.*, 428 F. Supp. 1288 (E.D. La.), *aff'd per curiam*, 550 F.2d 1035 (5th Cir. 1977).

For the foregoing reasons, as well as for the reasons stated in the IBAA's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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